Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1024

AMERICAN CONTINENTAL HOMES, INC. and AMERICAN FINANCIAL CORPORATION,

Petitioners,

vs.

KFK CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Appellate Court of Illinois for the Second District is reported at 71 Ill.App.3d 304, 389 N.E. 2d 232 (1979). (See appellants' brief, appendix 1a-14a.) One of the issues the Appellate Court ruled on was whether KFK Corporation (KFK) complied with the provision in the contract relative to using its "reasonable efforts" to dispose of some or all of American Continental Homes, Inc. (ACH) stock. The question decided was not interpretation of Rule 144 but rather the construction of the contractual terms between the parties.

JURISDICTION

No jurisdiction lies in the Supreme Court for the issue decided by the Appellate Court was interpretation of a provision in a certain contract and not the interpretation of any part of Rule 144 of the Securities and Exchange Commission.

STATEMENT OF THE CASE

A Complaint for Specific Performance was filed by KFK against ACH. The defendants filed an amendment to its answer (see appendix 1a) which affirmatively alleged that KFK did not comply with a condition precedent to recovery on said contract by failing to use all reasonable efforts to sell certain shares of ACH and for that reason defendants had no duty to purchase said shares. After hearing of all the evidence, the Trial Judge found for the plaintiff and against the defendant on this issue. The Appellate Court affirmed the Trial Court.

The facts established that on June 8, 1972, a contract was entered into by KFK and ACH providing for the sale and purchase of a subdivision. American Financial Corporation (AFC) executed said contract as a guarantor of the acts of ACH under the terms of said contract. Said contract provided that, as part of the consideration, KFK was to receive 46,380 shares of ACH stock, which it had the right to keep or dispose of within a period of time and, if unable to dispose of said shares "utilizing all reasonable efforts", could tender said shares for $850,000.

The Trial Judge found that, under the facts presented at trial, KFK had "utilized all reasonable efforts" to dispose of said stock. ACH and AFC appealed to the Appellate Court, specifically alleging as error this finding of the Trial Court. The Appellate Court addressed this issue (see page 8a of petitioners' brief). The Appellate Court referred to Rule 144; found that there was a difference between holding registered and unregistered stock; and found that the facts supported finding that KFK "utilized all reasonable efforts" to dispose of its ACH stock and thus fulfilled that condition precedent. The petitioners have attempted to cite a portion of the reasoning dealing with Rule 144 in hopes of obtaining jurisdiction to this Court. The Appellate Court did not interpret the Securities Act of 1933 (15 U.S.C. §77d, *et seq.*) or Rule 144 of the Securities and Exchange Commission.

CONCLUSION

The Appellate Court did not rule on the interpretation of a Federal statute but only a provision of a contract between KFK and ACH. Respondent-plaintiff KFK respectfully prays that the petition for certiorari be denied.

Respectfully submitted,

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APPENDIX

AMENDMENT TO ANSWER

(R. C147)

Now come American Continental Homes, Inc., and American Financial Corporation, by George W. Hamman, their attorney, and amend their Answer heretofore filed as follows:

Defendants add the following to their Answer to paragraph 10:

10. They deny the allegations of paragraph 10. Further answering, defendants state that a condition precedent to their obligation to repurchase the shares was that ". . . KFK shall undertake, utilizing all reasonable efforts, to dispose of so many of the ACH common shares as may be sold by it in conformity with the provisions of the Securities Act of 1933 and for the market price of such shares then prevailing . . .". KFK failed to make all reasonable efforts to sell said shares and accordingly defendants have no duty to purchase said shares.

May 12, 1976

JUDGMENT ORDER

(R. C203-C204)

This cause coming on for decision on the issues formulated by the pleadings, on which issues a hearing was held, and the Court having seen and heard the witnesses for the plaintiff and the defendants and the oral arguments of their respective counsel, and having examined the documents introduced into evidence, and being fully advised in the premises,

FINDS:

A. That the material issues relative to the Complaint for Specific Performance are with the plaintiff, K.F.K. Corporation, and against the defendants, American Continental Homes, Inc. and American Financial Corporation.

B. That the material issues relative to the Counterclaim filed by the defendants, American Continental Homes, Inc. and American Financial Corporation, are with the plaintiff, K.F.K. Corporation, and against the said defendants.

It Is Hereby Ordered, Adjudged And Decreed by the Court that a judgment be and the same is hereby entered in favor of the plaintiff, K.F.K. Corporation, and against the defendants, American Continental Homes, Inc. and American Financial Corporation, and each of them, jointly and severally, in the amount of Three Hundred Fifty Thousand Dollars ($350,000.00), together with plaintiff's costs of suit.

It Is Further Ordered, Adjudged And Decreed that the Counterclaim filed by the defendants, American Continental Homes, Inc. and American Financial Corporation, and against the plaintiff, K.F.K. Corporation, be and the same is hereby dismissed with prejudice.

It Is Further Ordered that a Writ of Execution issue on said Judgment.

Enter:

/s/ Bruce R. Fawell

Judge

Dated: April 14, 1977